

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005

Plaintiff,

v.

U.S. DEPARTMENT OF EDUCATION,
400 Maryland Avenue SW
Washington, DC 20202

Defendant.

Case No. 19-cv-3029

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Department of Education under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendant has failed to comply with the applicable time-limit provisions of FOIA, American Oversight is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from

continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization primarily engaged in disseminating information to the public. American Oversight is committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information gathered, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant U.S. Department of Education (Education) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). Education has possession, custody, and control of the records American Oversight has requested.

STATEMENT OF FACTS

7. President Trump recently nominated Steven Menashi, the Department of Education's former acting General Counsel, to the U.S. Court of Appeals for the Second Circuit. Before Mr. Menashi was the department's head lawyer, he was the Deputy Counsel for Postsecondary Education. As Mr. Menashi has been nominated to serve a lifetime term on the federal bench, there is an urgent need to reveal any communications with the potential to inform his confirmation process, for both the elected officials with the authority to confirm and the constituents they represent.

Ethics FOIA

8. On September 10, 2019, American Oversight submitted a FOIA request to Education seeking expedited production of:

- a. Any conflicts or ethics waivers or authorizations for Steven Menashi, including authorizations pursuant to 5 C.F.R. § 2635.502.
- b. Records reflecting any recusal determination made or issued for Mr. Menashi.
- c. Any ethics agreement or ethics or recusal screening agreement or protocol for Mr. Menashi.
- d. All email communications (including email messages, complete email chains, email attachments, calendar invitations, and attachments thereto) sent by former General Counsel Steven Menashi to any of the individuals or entities listed below:
 - I. George Mason University (@gmu.edu)
 - II. Mercatus Center (@mercatus.org)
 - III. Kirkland & Ellis (@kirkland.com)
 - IV. NBC Universal (@nbc.com and @nbcuniversal.com)

9. American Oversight requested all responsive records from May 24, 2017, to May 1, 2018.

10. Further, in an effort to accommodate Education and reduce the number of responsive records to be processed and produced, American Oversight limited its request to emails sent by former General Counsel Steven Menashi. American Oversight still requested that complete email chains be produced, displaying both the sent messages and the prior received messages in each email chain. This means, for example, that both Mr. Menashi's response to an email and the initial received message are responsive to this request and should be produced. This request included all prior messages (whether incoming or outgoing) reflected in the

responsive correspondence and any attachments thereto. A copy of the Ethics FOIA is attached hereto as Exhibit A, and incorporated herein.

11. By letter dated September 11, 2019, Education acknowledged receipt of American Oversight's FOIA request and assigned the Ethics FOIA tracking number 19-02227-F.

12. Education did not respond to American Oversight's request for expedited processing of the Ethics FOIA.

Immigration Communications FOIA

13. On September 10, 2019, American Oversight submitted a FOIA request to Education seeking expedited production of:

All email communications (including email messages, complete email chains, email attachments, calendar invitations, and attachments thereto) sent by former General Counsel Steven Menashi containing the following terms:

- a. "Plyler"
- b. "Public charge"
- c. "undocumented"
- d. "illegal alien"
- e. "illegal immigrant"

14. American Oversight requested all responsive records from May 24, 2017, to May 1, 2018.

15. Further, in an effort to accommodate Education and reduce the number of responsive records to be processed and produced, American Oversight limited its request to emails sent by former General Counsel Steven Menashi. American Oversight still requested that complete email chains be produced, displaying both the sent messages and the prior received messages in each email chain. This means, for example, that both Mr. Menashi's response to an email and the initial received message are responsive to this request and should be produced. This request included all prior messages (whether incoming or outgoing) reflected in the

responsive correspondence and any attachments thereto. A copy of the Immigration Communications FOIA is attached hereto as Exhibit B, and incorporated herein.

16. By letter dated September 11, 2019, Education acknowledged receipt of American Oversight's FOIA request and assigned the Immigration Communications FOIA tracking number 19-02226-F.

17. Education did not respond to American Oversight's request for expedited processing of the Immigration Communications FOIA.

White House Communications FOIA

18. On September 10, 2019, American Oversight submitted a FOIA request to Education seeking expedited production of:

All email communications (including email messages, complete email chains, email attachments, calendar invitations, and attachments thereto) between (1) former General Counsel Steven Menashi or any person communicating on his behalf, such as schedulers or assistants, and (2) any of the individuals or entities listed below:

- a. Stephen Miller (stephen.miller@who.eop.gov)
- b. Robert Gabriel (robert.gabriel@who.eop.gov)
- c. Jennifer Cytryn (jennifer.cytryn@who.eop.gov)
- d. McLaurine Klingler (including but not limited to the email address mclaurine.klingler@who.eop.gov)

19. American Oversight requested all responsive records from May 24, 2017, to May 1, 2018. A copy of the White House Communications FOIA is attached hereto as Exhibit C, and incorporated herein.

20. By letter dated September 11, 2019, Education acknowledged receipt of American Oversight's FOIA request and assigned the White House Communications FOIA tracking number 19-02225-F.

21. By letter dated September 17, 2019, Education denied American Oversight's request for expedited processing of the White House Communications FOIA.

External Communications FOIA

22. On September 10, 2019, American Oversight submitted a FOIA request to Education seeking expedited production of:

All email communications (including email messages, complete email chains, email attachments, calendar invitations, and attachments thereto) between (1) former General Counsel Steven Menashi or any person communicating on his behalf, such as schedulers or assistants, and (2) any of the individuals or entities listed below:

1. A Voice for Men (avoiceformen.com)
2. Alliance Defending Freedom (adflegal.org)
3. Carrie Severino
4. Center for Immigration Studies (cis.org)
5. Ed Bartlett
6. Ed Whelan (ewhelan@eppc.org)
7. Eric Rosenberg (erosenberg@rosenbergball.com)
8. Faith and Freedom Coalition (ffcoalition.com)
9. Families Advocating for Campus Equality (facecampusequality.org)
10. Family Policy Alliance (familypolicyalliance.com)
11. Family Research Council (frc.org)
12. Family Research Council Action (frcaction.org)
13. Federalist Society (fedsoc.org)
14. Federation for American Immigration Reform (fairus.org)
15. First Liberty (firstliberty.org)
16. Focus on the Family (focusonthefamily.com)
17. Greg Josefchuk
18. Heritage Action for America (heritageaction.org)
19. Heritage Foundation (heritage.org)
20. Immigration Reform Law Institute (irli.org)
21. Jake Goldberg
22. Jerry Falwell Jr.
23. Judicial Crisis Network
24. Justin Dillon (jdillon@kaiserdillon.com)
25. Kursat Pekgoz
26. Leonard Leo
27. Liberty Counsel (lc.org)
28. Liberty University (liberty.edu)

- 29. Mark Perry (mjerry@umflint.edu)
- 30. National Center for Men (nationalcenterformen.org)
- 31. National Coalition for Men (ncfm.org)
- 32. National Rifle Association (@nra.org, @nrahq.org, @nraila.org, or @am.com)
- 33. NumbersUSA (numbersusa.com)
- 34. Paul Elam (paul@avoiceformen.com)
- 35. Shan Wu
- 36. Stop Abusive and Violent Environments (saveservices.org)
- 37. The Remembrance Project (theremembranceproject.org)
- 38. Tom Rossley
- 39. Warren Farrell (warren@warrenfarrell.com)

23. American Oversight requested all responsive records from May 24, 2017, to May 1, 2018. A copy of the External Communications FOIA is attached hereto as Exhibit D, and incorporated herein.

24. By letter dated September 11, 2019, Education acknowledged receipt of American Oversight's FOIA request and assigned the External Communications FOIA tracking number 19-02224-F.

25. By letter dated September 17, 2019, Education denied American Oversight's request for expedited processing of the External Communications FOIA.

Exhaustion of Administrative Remedies

26. Through Education's failure to respond to American Oversight's requests for expedited processing of the Ethics FOIA and Immigration Communications FOIA within the time period required by law, American Oversight has constructively exhausted its administrative remedies as to that issue and seeks immediate judicial review.

27. Through Education's denial of American Oversight's requests for expedited processing of the White House Communications FOIA and External Communications FOIA,

American Oversight has exhausted its administrative remedies as to that issue and seeks immediate judicial review.

28. As of the date of this Complaint, Education has failed to (a) notify American Oversight of any determination regarding its FOIA requests, including the scope of any responsive records Education intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

29. Through Education's failure to respond to American Oversight's FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Grant Expedited Processing

30. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

31. American Oversight properly requested records within the possession, custody, and control of Education on an expedited basis.

32. Education is an agency subject to FOIA and must process FOIA requests on an expedited basis pursuant to the requirements of 5 U.S.C. § 552(a)(6)(E) and 34 C.F.R. § 5.21(i)(2)(i)(B).

33. The records sought by American Oversight contain information urgently needed in order to inform the public concerning actual or alleged government activity, and therefore justify expedited processing under 34 C.F.R. § 5.21(i)(2)(i)(B).

34. Education failed to make a determination as to whether expedited processing was appropriate for the Ethics FOIA and Immigration Communications FOIA and to notify American Oversight of any such determination within ten days after the date of the request.

35. Education's failure to grant expedited processing of the Ethics FOIA and Immigration Communications FOIA violates FOIA and agency regulations.

36. Plaintiff American Oversight is therefore entitled to injunctive and declaratory relief requiring Defendant to grant expedited processing of the Ethics FOIA and Immigration Communications FOIA.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Denial of Expedited Processing

37. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

38. American Oversight properly requested records within the possession, custody, and control of Education on an expedited basis.

39. Education is an agency subject to FOIA, and it must process FOIA requests on an expedited basis pursuant to the requirements of FOIA and agency regulations.

40. The records sought by American Oversight contain information urgently needed in order to inform the public concerning actual or alleged government activity, and therefore justify expedited processing under 34 C.F.R. § 5.21(i)(2)(i)(B).

41. Education wrongfully denied American Oversight's request for expedited processing of the White House Communications FOIA and the External Communications FOIA.

42. Education's denial of expedited processing under 34 C.F.R. § 5.21(i)(2)(i)(B) violated FOIA and agency regulations.

43. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Defendant to grant expedited processing of the White House Communications FOIA and the External Communications FOIA.

COUNT III
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Searches for Responsive Records

44. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

45. American Oversight properly requested records within the possession, custody, and control of Education.

46. Education is an agency subject to FOIA, and it must therefore make reasonable efforts to search for requested records.

47. Education has failed to promptly review agency records for the purpose of locating those records that are responsive to American Oversight's FOIA requests.

48. Education's failure to conduct adequate searches for responsive records violates FOIA and Education regulations.

49. Plaintiff American Oversight is therefore entitled to injunctive and declaratory relief requiring Defendant to promptly make reasonable efforts to search for records responsive to American Oversight's FOIA request.

COUNT IV
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

50. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

51. American Oversight properly requested records within the possession, custody, and control of Education.

52. Education is an agency subject to FOIA, and it must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

53. Education is wrongfully withholding non-exempt agency records requested by American Oversight by failing to produce non-exempt records responsive to its FOIA requests.

54. Education is wrongfully withholding non-exempt agency records requested by American Oversight by failing to segregate exempt information in otherwise non-exempt records responsive to American Oversight's FOIA requests.

55. Education's failure to provide all non-exempt responsive records violates FOIA and Education regulations.

56. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendant to expedite the processing of the FOIA requests identified in this Complaint;
- (2) Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to American Oversight's FOIA requests;

- (3) Order Defendant to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to American Oversight's FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;
- (4) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA requests;
- (5) Award American Oversight the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (6) Grant American Oversight such other relief as the Court deems just and proper.

Dated: October 10, 2019

Respectfully submitted,

/s/ Emma Lewis

Emma Lewis

D.C. Bar No. 144574

/s/ Sara Kaiser Creighton

Sara Kaiser Creighton

D.C. Bar No. 1002367

AMERICAN OVERSIGHT

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Washington, DC 20005

(202) 919-6303

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Counsel for Plaintiff

EXHIBIT A



September 10, 2019

VIA EMAIL

FOIA Public Liaison
U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Avenue SW, LBJ 2E320
Washington, DC 20202-4536
EDFOIAManager@ed.gov

Re: Expedited Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Education (Education), 34 C.F.R. Part 5, American Oversight makes the following request for records.

President Trump recently announced his intent to nominate Steven Menashi, the Department of Education's former acting General Counsel, to the U.S. Court of Appeals for the Second Circuit.¹ Before Mr. Menashi was the department's head lawyer, he was the Deputy Counsel for Postsecondary Education. As Mr. Menashi has been nominated to serve a lifetime term on the federal bench, there is an urgent need to reveal any communications with the potential to inform his confirmation process, for both the representatives with the authority to confirm and the constituents they represent.

American Oversight seeks records with the potential to shed light on Mr. Menashi's activities and communications during his tenure at Education.

Requested Records

American Oversight seeks expedited review of this request for the reasons identified below and requests that Education produce the following records as soon as practicable, and at least within twenty business days:

¹ Tal Axelrod, *Trump Taps White House Lawyer for Federal Appeals Court*, THE HILL (Aug. 18, 2019, 5:58 PM), <https://thehill.com/homenews/administration/457470-trump-taps-white-house-lawyer-for-federal-appeals-court>.



- a. Any conflicts or ethics waivers or authorizations for Steven Menashi, including authorizations pursuant to 5 C.F.R. § 2635.502.
- b. Records reflecting any recusal determination made or issued for Mr. Menashi.
- c. Any ethics agreement or ethics or recusal screening agreement or protocol for Mr. Menashi.
- d. All email communications (including email messages, complete email chains, email attachments, calendar invitations, and attachments thereto) sent by former General Counsel Steven Menashi to any of the individuals or entities listed below:
 - I. George Mason University (@gmu.edu)
 - II. Mercatus Center (@mercatus.org)
 - III. Kirkland & Ellis (@kirkland.com)
 - IV. NBC Universal (@nbc.com and @nbcuniversal.com)

Please provide all responsive records from May 24, 2017 to May 1, 2018.

In an effort to accommodate Education and reduce the number of responsive records to be processed and produced, American Oversight has limited its request to emails sent by former General Counsel Steven Menashi. To be clear, however, American Oversight still requests that complete email chains be produced, displaying both the sent messages and the prior received messages in each email chain. This means, for example, that both Mr. Menashi's response to an email and the initial received message are responsive to this request and should be produced.

This request includes all prior messages (whether incoming or outgoing) reflected in the responsive correspondence and any attachments thereto.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's regulations, American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees because disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government."² As Mr. Menashi's nomination process moves forward, the public has a significant interest in understanding Mr. Menashi's former activities at Education, including the types of communications he had while serving as acting general counsel and Postsecondary deputy counsel, as well as

² 5 U.S.C. § 552(a)(4)(A)(iii).

understanding whether a former Education official has complied with ethical requirements. Recent reporting has shed light on Mr. Menashi's former written opinions on a variety of social and political issues that raise questions about his activities while at the Department.³ Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including with whom Mr. Menashi corresponded and the extent of outside influence on Mr. Menashi's decisions. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.⁴ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.⁵

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.⁶ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to

³ Trudy Ring, *Trump Judicial Nominee Has History of Antigay, Misogynistic Writings*, ADVOCATE (Aug. 26, 2019, 11:28 AM), <https://www.advocate.com/politics/2019/8/26/trump-judicial-nominee-has-history-antigay-misogynistic-writings>; Andrew Kaczynski & Em Steck, *Trump Court Pick Denounced Feminists, Gay Rights Groups and Diversity Efforts in 1990s, 2000s Editorials*, CNN (Aug. 22, 2019, 5:13 PM), <https://www.cnn.com/2019/08/22/politics/kfile-steven-menashi-judge-nominee/index.html>; Eleanor Clift, *Trump Judge Pick Spread Anti-Muslim Pig Blood Bullet Myth*, THE DAILY BEAST (Aug. 24, 2019, 5:14 AM), <https://www.thedailybeast.com/trump-judge-pick-steven-menashi-spread-anti-muslim-pig-blood-bullet-myth>; Rachel Maddow, *Trump Nominates Advocate of 'Ethnonationalism' for Judgeship*, MSNBC, Aug. 15, 2019, <https://www.msnbc.com/rachel-maddow/watch/trump-nominates-advocate-of-ethnonationalism-for-judgeship-66238021914>.

⁴ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁵ American Oversight currently has approximately 12,200 page likes on Facebook and 54,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Sept. 9, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 9, 2019).

⁶ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;⁷ posting records received as part of American Oversight's "Audit the Wall" project to gather and analyze information related to the administration's proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;⁸ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;⁹ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁰ posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.¹¹

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 34 C.F.R. § 5.21(i)(2)(i)(B), American Oversight requests that your agency expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief that the information requested is urgently needed in order to inform the public concerning actual or alleged government activity. President Trump recently nominated former acting General Counsel

⁷ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

⁸ *See generally Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; *see, e.g., Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

⁹ *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

¹⁰ *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

¹¹ *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

Steven Menashi to the Second Circuit of the U.S Court of Appeals.¹² As Mr. Menashi has been nominated to serve a lifetime term on the federal bench, there is an urgent need to reveal communications with external parties and about pertinent matters Mr. Menashi worked on while serving at Education, including if he complied with his ethical requirements. The American public has a substantial and urgent interest in understanding Mr. Menashi's activities and decisions at Education as the confirmation process advances.¹³

Moreover, I certify to be true and correct to the best of my knowledge and belief that there is an urgent need to inform the public about Mr. Menashi's communications and activities while serving as a top lawyer for Education. There has been intense public interest in and concern about Mr. Menashi's previous opinions, and the American people need access to this information with sufficient time to advocate for their elected representatives to move forward with Mr. Menashi's nomination or to withdraw that support or reject his nomination to the Second Circuit.

I further certify that American Oversight is primarily engaged in disseminating information to the public. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,¹⁴ American Oversight "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience."¹⁵ American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight also makes

¹² See *President Donald J. Trump Announces Judicial Nominees, United States Attorney Nominees, and United States Marshal Nominees*, THE WHITE HOUSE (Aug. 14, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-attorney-nominees-united-states-marshal-nominees/>.

¹³ Trudy Ring, *Trump Judicial Nominee Has History of Antigay, Misogynistic Writings*, ADVOCATE (Aug. 26, 2019, 11:28 AM), <https://www.advocate.com/politics/2019/8/26/trump-judicial-nominee-has-history-antigay-misogynistic-writings>; Andrew Kaczynski & Em Steck, *Trump Court Pick Denounced Feminists, Gay Rights Groups and Diversity Efforts in 1990s, 2000s Editorials*, CNN (Aug. 22, 2019, 5:13 PM), <https://www.cnn.com/2019/08/22/politics/kfile-steven-menashi-judge-nominee/index.html>; Eleanor Clift, *Trump Judge Pick Spread Anti-Muslim Pig Blood Bullet Myth*, THE DAILY BEAST (Aug. 24, 2019, 5:14 AM), <https://www.thedailybeast.com/trump-judge-pick-steven-menashi-spread-anti-muslim-pig-blood-bullet-myth>; Rachel Maddow, *Trump Nominates Advocate of 'Ethnonationalism' for Judgeship*, MSNBC, Aug. 15, 2019, <https://www.msnbc.com/rachel-maddow/watch/trump-nominates-advocate-of-ethnonationalism-for-judgeship-66238021914>.

¹⁴ See *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

¹⁵ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹⁶ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.¹⁷

Accordingly, American Oversight's request satisfies the criteria for expedition.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks "communications," please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct

¹⁶ American Oversight currently has approximately 12,200 page likes on Facebook and 54,500 followers on Twitter. American Oversight, FACEBOOK,

<https://www.facebook.com/weareoversight>

(last visited Sept. 9, 2019); American Oversight (@weareoversight), TWITTER,

<https://twitter.com/weareoversight> (last visited Sept. 9, 2019).

¹⁷ See generally *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>; see, e.g., *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>; *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>; *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>; *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>; *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.

- In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹⁸ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.¹⁹
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,²⁰ and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be

¹⁸ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

¹⁹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²⁰ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Cerissa Cafasso at foia@americanoversight.org or (202) 869-5244. Also, if American Oversight's request for expedition is not granted or its

request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight

EXHIBIT B



September 10, 2019

VIA EMAIL

FOIA Public Liaison
U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Avenue SW, LBJ 2E320
Washington, DC 20202-4536
EDFOIAManager@ed.gov

Re: Expedited Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Education (Education), 34 C.F.R. Part 5, American Oversight makes the following request for records.

President Trump recently announced his intent to nominate Steven Menashi, the Department of Education's former acting General Counsel, to the U.S. Court of Appeals for the Second Circuit.¹ Before Mr. Menashi was the department's head lawyer, he was the Deputy Counsel for Postsecondary Education. As Mr. Menashi has been nominated to serve a lifetime term on the federal bench, there is an urgent need to reveal any communications with the potential to inform his confirmation process, for both the representatives with the authority to confirm and the constituents they represent.

American Oversight seeks records with the potential to shed light on Mr. Menashi's activities and communications during his tenure at Education.

Requested Records

American Oversight seeks expedited review of this request for the reasons identified below and requests that Education produce the following records as soon as practicable, and at least within twenty business days:

¹ Tal Axelrod, *Trump Taps White House Lawyer for Federal Appeals Court*, THE HILL (Aug. 18, 2019, 5:58 PM), <https://thehill.com/homenews/administration/457470-trump-taps-white-house-lawyer-for-federal-appeals-court>.



All email communications (including email messages, complete email chains, email attachments, calendar invitations, and attachments thereto) sent by former General Counsel Steven Menashi containing the following terms:

- a. “Plyler”
- b. “Public charge”
- c. “undocumented”
- d. “illegal alien”
- e. “illegal immigrant”

Please provide all responsive records from May 24, 2017 to May 1, 2018.

In an effort to accommodate Education and reduce the number of responsive records to be processed and produced, American Oversight has limited its request to emails sent by former General Counsel Steven Menashi. To be clear, however, American Oversight still requests that complete email chains be produced, displaying both the sent messages and the prior received messages in each email chain. This means, for example, that both Mr. Menashi’s response to an email and the initial received message are responsive to this request and should be produced.

This request includes all prior messages (whether incoming or outgoing) reflected in the responsive correspondence and any attachments thereto.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency’s regulations, American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government.”² As Mr. Menashi’s nomination process moves forward, the public has a significant interest in understanding Mr. Menashi’s former activities at Education, including the types of communications he had while serving as acting general counsel and Postsecondary deputy counsel, as well as understanding whether a former Education official has complied with ethical requirements. Recent reporting has shed light on Mr. Menashi’s former written opinions on a variety of social and political issues that raise questions about his activities while at

² 5 U.S.C. § 552(a)(4)(A)(iii).

the Department.³ Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including with whom Mr. Menashi corresponded and the extent of outside influence on Mr. Menashi's decisions. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.⁴ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.⁵

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.⁶ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such

³ Trudy Ring, *Trump Judicial Nominee Has History of Antigay, Misogynistic Writings*, ADVOCATE (Aug. 26, 2019, 11:28 AM), <https://www.advocate.com/politics/2019/8/26/trump-judicial-nominee-has-history-antigay-misogynistic-writings>; Andrew Kaczynski & Em Steck, *Trump Court Pick Denounced Feminists, Gay Rights Groups and Diversity Efforts in 1990s, 2000s Editorials*, CNN (Aug. 22, 2019, 5:13 PM), <https://www.cnn.com/2019/08/22/politics/kfile-steven-menashi-judge-nominee/index.html>; Eleanor Clift, *Trump Judge Pick Spread Anti-Muslim Pig Blood Bullet Myth*, THE DAILY BEAST (Aug. 24, 2019, 5:14 AM), <https://www.thedailybeast.com/trump-judge-pick-steven-menashi-spread-anti-muslim-pig-blood-bullet-myth>; Rachel Maddow, *Trump Nominates Advocate of 'Ethnonationalism' for Judgeship*, MSNBC, Aug. 15, 2019, <https://www.msnbc.com/rachel-maddow/watch/trump-nominates-advocate-of-ethnonationalism-for-judgeship-66238021914>.

⁴ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁵ American Oversight currently has approximately 12,200 page likes on Facebook and 54,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Sept. 9, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 9, 2019).

⁶ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

waivers;⁷ posting records received as part of American Oversight’s “Audit the Wall” project to gather and analyze information related to the administration’s proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;⁸ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;⁹ posting records and analysis relating to the federal government’s efforts to sell nuclear technology to Saudi Arabia;¹⁰ posting records and analysis regarding the Department of Justice’s decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President’s political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.¹¹

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 34 C.F.R. § 5.21(i)(2)(i)(B), American Oversight requests that your agency expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief that the information requested is urgently needed in order to inform the public concerning actual or alleged government activity. President Trump recently nominated former acting General Counsel Steven Menashi to the Second Circuit of the U.S Court of Appeals.¹² As Mr. Menashi has

⁷ *DOJ Records Relating to Solicitor General Noel Francisco’s Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

⁸ *See generally Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; *see, e.g., Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

⁹ *Documents Reveal Ben Carson Jr.’s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

¹⁰ *Investigating the Trump Administration’s Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

¹¹ *Sessions’ Letter Shows DOJ Acted On Trump’s Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

¹² *See President Donald J. Trump Announces Judicial Nominees, Unites States Attorney Nominees, and United States Marshal Nominees*, THE WHITE HOUSE (Aug. 14, 2019),

been nominated to serve a lifetime term on the federal bench, there is an urgent need to reveal communications with external parties and about pertinent matters Mr. Menashi worked on while serving at Education, including if he complied with his ethical requirements. The American public has a substantial and urgent interest in understanding Mr. Menashi's activities and decisions at Education as the confirmation process advances.¹³

Moreover, I certify to be true and correct to the best of my knowledge and belief that there is an urgent need to inform the public about Mr. Menashi's communications and activities while serving as a top lawyer for Education. There has been intense public interest in and concern about Mr. Menashi's previous opinions, and the American people need access to this information with sufficient time to advocate for their elected representatives to move forward with Mr. Menashi's nomination or to withdraw that support or reject his nomination to the Second Circuit.

I further certify that American Oversight is primarily engaged in disseminating information to the public. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,¹⁴ American Oversight "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience."¹⁵ American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social

<https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-attorney-nominees-united-states-marshall-nominees/>.

¹³ Trudy Ring, *Trump Judicial Nominee Has History of Antigay, Misogynistic Writings*, ADVOCATE (Aug. 26, 2019, 11:28 AM), <https://www.advocate.com/politics/2019/8/26/trump-judicial-nominee-has-history-antigay-misogynistic-writings>; Andrew Kaczynski & Em Steck, *Trump Court Pick Denounced Feminists, Gay Rights Groups and Diversity Efforts in 1990s, 2000s Editorials*, CNN (Aug. 22, 2019, 5:13 PM), <https://www.cnn.com/2019/08/22/politics/kfile-steven-menashi-judge-nominee/index.html>; Eleanor Clift, *Trump Judge Pick Spread Anti-Muslim Pig Blood Bullet Myth*, THE DAILY BEAST (Aug. 24, 2019, 5:14 AM), <https://www.thedailybeast.com/trump-judge-pick-steven-menashi-spread-anti-muslim-pig-blood-bullet-myth>; Rachel Maddow, *Trump Nominates Advocate of 'Ethnonationalism' for Judgeship*, MSNBC, Aug. 15, 2019, <https://www.msnbc.com/rachel-maddow/watch/trump-nominates-advocate-of-ethnonationalism-for-judgeship-66238021914>.

¹⁴ See *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

¹⁵ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

media platforms, such as Facebook and Twitter.¹⁶ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.¹⁷

Accordingly, American Oversight's request satisfies the criteria for expedition.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks "communications," please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.

¹⁶ American Oversight currently has approximately 12,200 page likes on Facebook and 54,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight>

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¹⁷ See generally *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>; see, e.g., *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>; *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>; *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>; *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>; *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

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- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹⁸ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.¹⁹
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¹⁸ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

¹⁹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²⁰ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

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We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Cerissa Cafasso at foia@americanoversight.org or (202) 869-5244. Also, if American Oversight's request for expedition is not granted or its

request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight

EXHIBIT C



September 10, 2019

VIA EMAIL

FOIA Public Liaison
U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Avenue SW, LBJ 2E320
Washington, DC 20202-4536
EDFOIAManager@ed.gov

Re: Expedited Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Education (Education), 34 C.F.R. Part 5, American Oversight makes the following request for records.

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American Oversight seeks records with the potential to shed light on Mr. Menashi's activities and communications during his tenure at Education.

Requested Records

American Oversight seeks expedited review of this request for the reasons identified below and requests that Education produce the following records as soon as practicable, and at least within twenty business days:

¹ Tal Axelrod, *Trump Taps White House Lawyer for Federal Appeals Court*, THE HILL (Aug. 18, 2019, 5:58 PM), <https://thehill.com/homenews/administration/457470-trump-taps-white-house-lawyer-for-federal-appeals-court>.



All email communications (including email messages, complete email chains, email attachments, calendar invitations, and attachments thereto) between (1) former General Counsel Steven Menashi or any person communicating on his behalf, such as schedulers or assistants, and (2) any of the individuals or entities listed below:

- a. Stephen Miller (stephen.miller@who.eop.gov)
- b. Robert Gabriel (robert.gabriel@who.eop.gov)
- c. Jennifer Cytryn (jennifer.cytryn@who.eop.gov)
- d. McLaurine Klingler (including but not limited to the email address mclaurine.klingler@who.eop.gov)

Please provide all responsive records from May 24, 2017 to May 1, 2018.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's regulations, American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees because disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government."² As Mr. Menashi's nomination process moves forward, the public has a significant interest in understanding Mr. Menashi's former activities at Education, including the types of communications he had while serving as acting general counsel and Postsecondary deputy counsel, as well as understanding whether a former Education official has complied with ethical requirements. Recent reporting has shed light on Mr. Menashi's former written opinions on a variety of social and political issues that raise questions about his activities while at the Department.³ Records with the potential to shed light on this matter would contribute

² 5 U.S.C. § 552(a)(4)(A)(iii).

³ Trudy Ring, *Trump Judicial Nominee Has History of Antigay, Misogynistic Writings*, ADVOCATE (Aug. 26, 2019, 11:28 AM), <https://www.advocate.com/politics/2019/8/26/trump-judicial-nominee-has-history-antigay-misogynistic-writings>; Andrew Kaczynski & Em Steck, *Trump Court Pick Denounced Feminists, Gay Rights Groups and Diversity Efforts in 1990s, 2000s Editorials*, CNN (Aug. 22, 2019, 5:13 PM), <https://www.cnn.com/2019/08/22/politics/kfile-steven-menashi-judge-nominee/index.html>; Eleanor Clift, *Trump Judge Pick Spread Anti-Muslim Pig Blood Bullet Myth*, THE DAILY BEAST (Aug. 24, 2019, 5:14 AM), <https://www.thedailybeast.com/trump-judge-pick-steven-menashi-spread-anti-muslim-pig-blood-bullet-myth>; Rachel Maddow, *Trump Nominates Advocate of 'Ethnonationalism' for Judgeship*, MSNBC, Aug. 15, 2019,

significantly to public understanding of operations of the federal government, including with whom Mr. Menashi corresponded and the extent of outside influence on Mr. Menashi's decisions. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.⁴ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.⁵

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.⁶ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;⁷ posting records received as part of American Oversight's "Audit the Wall" project to gather and analyze information related to the administration's proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;⁸ posting

<https://www.msnbc.com/rachel-maddow/watch/trump-nominates-advocate-of-ethnonationalism-for-judgeship-66238021914>.

⁴ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁵ American Oversight currently has approximately 12,200 page likes on Facebook and 54,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Sept. 9, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 9, 2019).

⁶ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

⁷ DOJ Records Relating to Solicitor General Noel Francisco's Recusal, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; Francisco & the Travel Ban: What We Learned from the DOJ Documents, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

⁸ See generally *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; see, e.g., *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT,

records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;⁹ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁰ posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.¹¹

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 34 C.F.R. § 5.21(i)(2)(i)(B), American Oversight requests that your agency expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief that the information requested is urgently needed in order to inform the public concerning actual or alleged government activity. President Trump recently nominated former acting General Counsel Steven Menashi to the Second Circuit of the U.S Court of Appeals.¹² As Mr. Menashi has been nominated to serve a lifetime term on the federal bench, there is an urgent need to reveal communications with external parties and about pertinent matters Mr. Menashi worked on while serving at Education, including if he complied with his ethical requirements. The American public has a substantial and urgent interest in understanding Mr. Menashi's activities and decisions at Education as the confirmation process advances.¹³

<https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

⁹ *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

¹⁰ *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

¹¹ *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

¹² *See President Donald J. Trump Announces Judicial Nominees, Unites States Attorney Nominees, and United States Marshal Nominees*, THE WHITE HOUSE (Aug. 14, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-attorney-nominees-united-states-marshal-nominees/>.

¹³ Trudy Ring, *Trump Judicial Nominee Has History of Antigay, Misogynistic Writings*, ADVOCATE (Aug. 26, 2019, 11:28 AM), <https://www.advocate.com/politics/2019/8/26/trump-judicial-nominee-has-history-antigay-misogynistic-writings>; Andrew Kaczynski & Em Steck, *Trump Court Pick Denounced Feminists, Gay Rights Groups and Diversity Efforts in 1990s*,

Moreover, I certify to be true and correct to the best of my knowledge and belief that there is an urgent need to inform the public about Mr. Menashi's communications and activities while serving as a top lawyer for Education. There has been intense public interest in and concern about Mr. Menashi's previous opinions, and the American people need access to this information with sufficient time to advocate for their elected representatives to move forward with Mr. Menashi's nomination or to withdraw that support or reject his nomination to the Second Circuit.

I further certify that American Oversight is primarily engaged in disseminating information to the public. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,¹⁴ American Oversight "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience."¹⁵ American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹⁶ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.¹⁷

2000s Editorials, CNN (Aug. 22, 2019, 5:13 PM), <https://www.cnn.com/2019/08/22/politics/kfile-steven-menashi-judge-nominee/index.html>; Eleanor Clift, *Trump Judge Pick Spread Anti-Muslim Pig Blood Bullet Myth*, THE DAILY BEAST (Aug. 24, 2019, 5:14 AM), <https://www.thedailybeast.com/trump-judge-pick-steven-menashi-spread-anti-muslim-pig-blood-bullet-myth>; Rachel Maddow, *Trump Nominates Advocate of 'Ethnonationalism' for Judgeship*, MSNBC, Aug. 15, 2019, <https://www.msnbc.com/rachel-maddow/watch/trump-nominates-advocate-of-ethnonationalism-for-judgeship-66238021914>.

¹⁴ See *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

¹⁵ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

¹⁶ American Oversight currently has approximately 12,200 page likes on Facebook and 54,500 followers on Twitter. American Oversight, FACEBOOK,

<https://www.facebook.com/weareoversight> (last visited Sept. 9, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 9, 2019).

¹⁷ See generally *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>; see, e.g., *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>; *Audit the Wall*, AMERICAN OVERSIGHT,

Accordingly, American Oversight's request satisfies the criteria for expedition.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks "communications," please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.
- In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.

<https://www.americanoversight.org/investigation/audit-the-wall>; *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>; *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>; *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>; *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹⁸ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.¹⁹
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,²⁰ and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please

¹⁸ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

¹⁹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²⁰ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Cerissa Cafasso at foia@americanoversight.org or (202) 869-5244. Also, if American Oversight's request for expedition is not granted or its request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink, appearing to read "Austin R. Evers", with a long horizontal line extending to the left.

Austin R. Evers
Executive Director
American Oversight

EXHIBIT D



September 10, 2019

VIA EMAIL

FOIA Public Liaison
U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Avenue SW, LBJ 2E320
Washington, DC 20202-4536
EDFOIAManager@ed.gov

Re: Expedited Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Education (Education), 34 C.F.R. Part 5, American Oversight makes the following request for records.

President Trump recently announced his intent to nominate Steven Menashi, the Department of Education's former acting General Counsel, to the U.S. Court of Appeals for the Second Circuit.¹ Before Mr. Menashi was the department's head lawyer, he was the Deputy Counsel for Postsecondary Education. As Mr. Menashi has been nominated to serve a lifetime term on the federal bench, there is an urgent need to reveal any communications with the potential to inform his confirmation process, for both the representatives with the authority to confirm and the constituents they represent.

American Oversight seeks records with the potential to shed light on Mr. Menashi's activities and communications during his tenure at Education.

Requested Records

American Oversight seeks expedited review of this request for the reasons identified below and requests that Education produce the following records as soon as practicable, and at least within twenty business days:

¹ Tal Axelrod, *Trump Taps White House Lawyer for Federal Appeals Court*, THE HILL (Aug. 18, 2019, 5:58 PM), <https://thehill.com/homenews/administration/457470-trump-taps-white-house-lawyer-for-federal-appeals-court>.



All email communications (including email messages, complete email chains, email attachments, calendar invitations, and attachments thereto) between (1) former General Counsel Steven Menashi or any person communicating on his behalf, such as schedulers or assistants, and (2) any of the individuals or entities listed below:

1. A Voice for Men (avoiceformen.com)
2. Alliance Defending Freedom (adflegal.org)
3. Carrie Severino
4. Center for Immigration Studies (cis.org)
5. Ed Bartlett
6. Ed Whelan (ewhelan@eppc.org)
7. Eric Rosenberg (erosenberg@rosenbergball.com)
8. Faith and Freedom Coalition (ffcoalition.com)
9. Families Advocating for Campus Equality (facecampusequality.org)
10. Family Policy Alliance (familypolicyalliance.com)
11. Family Research Council (frc.org)
12. Family Research Council Action (frcaction.org)
13. Federalist Society (fedsoc.org)
14. Federation for American Immigration Reform (fairus.org)
15. First Liberty (firstliberty.org)
16. Focus on the Family (focusonthefamily.com)
17. Greg Josefchuk
18. Heritage Action for America (heritageaction.org)
19. Heritage Foundation (heritage.org)
20. Immigration Reform Law Institute (irli.org)
21. Jake Goldberg
22. Jerry Falwell Jr.
23. Judicial Crisis Network
24. Justin Dillon (jdillon@kaiserdillon.com)
25. Kursat Pekgoz
26. Leonard Leo
27. Liberty Counsel (lc.org)
28. Liberty University (liberty.edu)
29. Mark Perry (mjperry@umflint.edu)
30. National Center for Men (nationalcenterformen.org)
31. National Coalition for Men (ncfm.org)
32. National Rifle Association (@nra.org, @nrahq.org, @nraila.org, or @am.com)
33. NumbersUSA (numbersusa.com)
34. Paul Elam (paul@avoiceformen.com)
35. Shan Wu
36. Stop Abusive and Violent Environments (saveservices.org)
37. The Remembrance Project (theremembranceproject.org)
38. Tom Rossley

39. Warren Farrell (warren@warrenfarrell.com)

Please provide all responsive records from May 24, 2017 to May 1, 2018.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's regulations, American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees because disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government."² As Mr. Menashi's nomination process moves forward, the public has a significant interest in understanding Mr. Menashi's former activities at Education, including the types of communications he had while serving as acting general counsel and Postsecondary deputy counsel, as well as understanding whether a former Education official has complied with ethical requirements. Recent reporting has shed light on Mr. Menashi's former written opinions on a variety of social and political issues that raise questions about his activities while at the Department.³ Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including with whom Mr. Menashi corresponded and the extent of outside influence on Mr. Menashi's decisions. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

² 5 U.S.C. § 552(a)(4)(A)(iii).

³ Trudy Ring, *Trump Judicial Nominee Has History of Antigay, Misogynistic Writings*, ADVOCATE (Aug. 26, 2019, 11:28 AM), <https://www.advocate.com/politics/2019/8/26/trump-judicial-nominee-has-history-antigay-misogynistic-writings>; Andrew Kaczynski & Em Steck, *Trump Court Pick Denounced Feminists, Gay Rights Groups and Diversity Efforts in 1990s, 2000s Editorials*, CNN (Aug. 22, 2019, 5:13 PM), <https://www.cnn.com/2019/08/22/politics/kfile-steven-menashi-judge-nominee/index.html>; Eleanor Clift, *Trump Judge Pick Spread Anti-Muslim Pig Blood Bullet Myth*, THE DAILY BEAST (Aug. 24, 2019, 5:14 AM), <https://www.thedailybeast.com/trump-judge-pick-steven-menashi-spread-anti-muslim-pig-blood-bullet-myth>; Rachel Maddow, *Trump Nominates Advocate of 'Ethnonationalism' for Judgeship*, MSNBC, Aug. 15, 2019, <https://www.msnbc.com/rachel-maddow/watch/trump-nominates-advocate-of-ethnonationalism-for-judgeship-66238021914>.

This request is primarily and fundamentally for non-commercial purposes.⁴ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.⁵

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⁴ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁵ American Oversight currently has approximately 12,200 page likes on Facebook and 54,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Sept. 9, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 9, 2019).

⁶ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

⁷ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

⁸ See generally *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; see, e.g., *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

⁹ *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

government's efforts to sell nuclear technology to Saudi Arabia;¹⁰ posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.¹¹

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 34 C.F.R. § 5.21(i)(2)(i)(B), American Oversight requests that your agency expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief that the information requested is urgently needed in order to inform the public concerning actual or alleged government activity. President Trump recently nominated former acting General Counsel Steven Menashi to the Second Circuit of the U.S Court of Appeals.¹² As Mr. Menashi has been nominated to serve a lifetime term on the federal bench, there is an urgent need to reveal communications with external parties and about pertinent matters Mr. Menashi worked on while serving at Education, including if he complied with his ethical requirements. The American public has a substantial and urgent interest in understanding Mr. Menashi's activities and decisions at Education as the confirmation process advances.¹³

¹⁰ *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

¹¹ *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

¹² *See President Donald J. Trump Announces Judicial Nominees, Unites States Attorney Nominees, and United States Marshal Nominees*, THE WHITE HOUSE (Aug. 14, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-attorney-nominees-united-states-marshal-nominees/>.

¹³ Trudy Ring, *Trump Judicial Nominee Has History of Antigay, Misogynistic Writings*, ADVOCATE (Aug. 26, 2019, 11:28 AM), <https://www.advocate.com/politics/2019/8/26/trump-judicial-nominee-has-history-antigay-misogynistic-writings>; Andrew Kaczynski & Em Steck, *Trump Court Pick Denounced Feminists, Gay Rights Groups and Diversity Efforts in 1990s, 2000s Editorials*, CNN (Aug. 22, 2019, 5:13 PM), <https://www.cnn.com/2019/08/22/politics/kfile-steven-menashi-judge-nominee/index.html>; Eleanor Clift, *Trump Judge Pick Spread Anti-Muslim Pig Blood Bullet Myth*, THE DAILY BEAST (Aug. 24, 2019, 5:14 AM), <https://www.thedailybeast.com/trump-judge-pick-steven-menashi-spread-anti-muslim-pig-blood-bullet-myth>; Rachel Maddow, *Trump Nominates Advocate of 'Ethnonationalism' for Judgeship*, MSNBC, Aug. 15, 2019,

Moreover, I certify to be true and correct to the best of my knowledge and belief that there is an urgent need to inform the public about Mr. Menashi's communications and activities while serving as a top lawyer for Education. There has been intense public interest in and concern about Mr. Menashi's previous opinions, and the American people need access to this information with sufficient time to advocate for their elected representatives to move forward with Mr. Menashi's nomination or to withdraw that support or reject his nomination to the Second Circuit.

I further certify that American Oversight is primarily engaged in disseminating information to the public. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,¹⁴ American Oversight "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience."¹⁵ American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹⁶ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.¹⁷

<https://www.msnbc.com/rachel-maddow/watch/trump-nominates-advocate-of-ethnonationalism-for-judgeship-66238021914>.

¹⁴ See *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

¹⁵ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

¹⁶ American Oversight currently has approximately 12,200 page likes on Facebook and 54,500 followers on Twitter. American Oversight, FACEBOOK,

<https://www.facebook.com/weareoversight>

(last visited Sept. 9, 2019); American Oversight (@weareoversight), TWITTER,

<https://twitter.com/weareoversight> (last visited Sept. 9, 2019).

¹⁷ See generally *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>; see, e.g., *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>; *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>; *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use>

Accordingly, American Oversight's request satisfies the criteria for expedition.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks "communications," please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.
- In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal

[his-influence-at-hud-to-help-his-business](https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia); *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>; *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

Records Act and FOIA.¹⁸ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.¹⁹

- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,²⁰ and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

¹⁸ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

¹⁹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²⁰ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Cerissa Cafasso at foia@americanoversight.org or (202) 869-5244. Also, if American Oversight's request for expedition is not granted or its request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink, appearing to read "Austin R. Evers", with a long horizontal line extending to the left.

Austin R. Evers
Executive Director
American Oversight